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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 949

[redacted].

JOHN PATRICK DUNN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

* *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

* *

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INDEX

	Page
Table of Citations	i
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	11
Conclusion	19

TABLE OF CITATIONS

CASES:

Brookhart v. Janis, 384 U.S. 1 (1966)	14
Commonwealth v. Boris, 317 Mass. 309, 58 N.E.2d 8 (1944)	16
Dyke v. Taylor Implement Manufacturing Co., Inc., 391 U.S. 216 (1968)	13
Henry v. Mississippi, 379 U.S. 443 (1965)	14
Johnson v. Zerbst, 304 U.S. 458 (1938)	15
Kasle v. United States, 233 F. 878 (6th Cir. 1916)	16-17
Preston v. United States, 376 U.S. 364 (1964)	13
State v. Hamilton, 166 S.C. 274, 164 S.E. 639 (1932)	16
State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935)	16
United States v. Werner, 160 F.2d 438 (1st Cir. 1947)	16
Von Sprecken v. State, 70 Ga. App. 222, 28 S.E.2d 341 (1943)	16

CONSTITUTIONAL PROVISIONS:
Constitution of the United States, Amendment IV 2-3
Constitution of the United States, Amendment V 3

STATUTES:
Title 18 United States Code, Sec. 2312 2,3,4,7
Title 18 United States Code, Sec. 3231 11
Title 28 United States Code, Sec. 1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No._____

Misc.

JOHN PATRICK DUNN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

* *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* *

The petitioner, John Patrick Dunn, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on November 14, 1969.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is not reported. A copy of this opinion is appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was made and entered on November 14, 1969. The jurisdiction of this Court is

invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Whether it is a denial of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States in a federal criminal action, for the court to admit evidence against the defendant which was apparently the product of an unconstitutional search and seizure, without securing defendant's waiver to the introduction of such evidence, there being no indication in the record that the absence of an objection to this evidence was part of defendant's trial strategy.

2. Whether the defendant can be lawfully convicted of violating the Dyer Act, 18 U.S.C. 2312, when the court, sitting as trier of fact, employs the objective standard of "knew or should have known," instead of the subjective standard, in determining the issue of knowledge that the automobile was stolen.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but

upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Code:

18 U.S.C. 2312

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

This proceeding arises in the United States District Court for the Middle District of North Carolina. Petitioner was indicted for violation of the Dyer Act, 18 U.S.C. 2312. (App.8) He was represented by appointed counsel. (Tr. 17) The trial was before the Honorable Eugene G. Gordon, United States District Judge, without a jury. (Tr. 29-31,1) On February 28, 1969, the court rendered a verdict of guilty as charged. (Tr. 348) On April 14, 1969, petitioner was sentenced to a four-year term of imprisonment. (Tr. 392) From the conviction and sentence petitioner appealed to the United States Court of Appeals for the Fourth Circuit, where his conviction was affirmed by decision dated November 14, 1969.

The Government's case consisted principally of evidence to prove the automobile was stolen, petitioner was in the possession of it in a state other than that in which it had been stolen, the serial number had been altered, and the automobile had a New York registration card while it bore New Jersey license plates. The owner of the automobile, a 1966 Buick, testified that he parked it on a street in Brooklyn, New York, on May 19, 1968, and that when he returned on May 25, the automobile was missing. (Tr. 6-9) A used car dealer in High Point, North Carolina, testified that petitioner came to his lot on August 26, 1968, identifying himself as a Mr. Dixon, offering to sell a 1966

Buick automobile. The witness stated that he became concerned when he noticed the registration card and license tags were from different states, and at this point he called the FBI.(Tr. 18-25)

The Government's evidence on identification was derived solely from an identification plate removed from the left door post of the automobile, which an expert witness testified was in an altered condition, and further testified that the number prior to alteration was identical to the number which the owner of the automobile had read from the bill of sale. This number was 454396Y108561, of which the last digit had been altered from one to four.(Tr. 8,59-64)

The identification plate was removed from petitioner's automobile by FBI agent Frank Fairchild, following a lengthy interrogation of petitioner and inspection of the vehicle, subsequent to which petitioner was released and then charged with reckless driving immediately afterwards.(Tr. 55)

Upon receiving the call from the used car dealer, FBI agent Fairchild went to the used car lot and found petitioner. After giving petitioner warnings of right to remain silent and right to counsel, the FBI agent questioned petitioner about the automobile. Petitioner responded that he had purchased the automobile about two years previously in New York City; he denied that the car was stolen. Petitioner showed the FBI agent a New Jersey drivers license in the name of Robert

Dixon, and a New York registration for the car in the same name.(Tr. 29-36)

Petitioner acceded to the FBI agent's request that the automobile be examined at a garage in High Point(Tr. 36), but petitioner insisted that he be present during the inspection.(Tr. 256) Petitioner testified that he was placed in an office in the garage and was told that he could not be admitted while the automobile was being checked. On one occasion petitioner got up to get a drink, but he was ordered to return to his seat and not to move.(Tr. 256-258)

After examination of the automobile was completed in the garage, the FBI agent gave petitioner permission to leave the garage. The agent said, "I had no information that the car was stolen, so I had no reason to hold him." The identification plate was not removed from the automobile prior to this release of petitioner.(Tr. 55-56) Sergeant Bowers of the High Point Police Department testified that a stranger stopped him on a street and told him that he thought there was "a fellow down at Welch's Garage drunk." Sergeant Bowers went inside the garage, observed petitioner, and had a conversation with FBI agent Fairchild. The witness was unable to remember the contents of this conversation, except to recall that there was some reference to a car. (Tr. 45-48) At one point Sergeant Bowers said petitioner appeared to be intoxicated (Tr. 46), and later he said that petitioner did not appear to be intoxicated but that he was asleep. (Tr. 47) The officer left Welch's

Garage, waited around the corner, and as soon as petitioner drove out of Welch's Garage, the officer arrested petitioner for reckless driving.(Tr. 41-42,49) Petitioner was taken to the police station, a warrant was issued for him, and he was placed in jail.(Tr. 50) On the following day, August 27, 1968, petitioner was delivered from the High Point Police to the federal authorities, and he was brought before a United States Commissioner on a federal warrant charging him with violation of the Dyer Act.(Tr. 51) Petitioner never saw the automobile after having been jailed on the charge of reckless driving. The identification plate necessarily was removed from the automobile sometime after petitioner was placed in the High Point Jail and before he appeared before the United States Commissioner the next day. The record contains no indication that a warrant was obtained to search the automobile, nor was there any evidence that petitioner consented to searching the automobile and removing the identification plate from it after he was taken into custody. The identification plate was offered into evidence by the Government without any objection on behalf of petitioner.(Tr. 37,40) But the court did not make any inquiry on its own motion relative to petitioner's right to challenge the admission of this exhibit, on the ground that it was the product of an unconstitutional search and seizure, nor does the record give any indication that either petitioner or his court-appointed counsel considered taking steps to exclude this piece of

evidence or that its admission was part of purposeful trial strategy on the part of the defense.

Petitioner himself testified at the trial and offered the evidence of several witnesses, including his two sons, which had a bearing on the issue of whether petitioner had knowledge the automobile was stolen. The circumstance of petitioner's being found with an allegedly stolen automobile in High Point, North Carolina, was the culmination of a complex series of events which had their beginning in petitioner's hometown of Rockaway, New Jersey, in May, 1968. Through the testimony of petitioner and his son, Daniel Dunn, it was shown that petitioner's son had bought a series of three Cadillacs in May, 1968, from a man by the name of Duke Bryant, who represented himself to be a wholesale car dealer from Brooklyn. The first two Cadillacs were sold by Daniel Dunn to large buyers of used automobiles, through a local man by the name of Yanovak, after it was discovered that these automobiles were damaged. (Tr. 66-74,181-190) A third Cadillac and a Buick were delivered to Daniel Dunn by Duke Bryant. Petitioner, upon his son's suggestion, used the third Cadillac to take a vacation with his wife to St. Petersburg, Florida, where the automobile was traded at a Cadillac agency, for another Cadillac. The Buick automobile was removed from the premises by persons unknown to the witnesses in the middle of July, 1968.(Tr. 75-77,190-201)

An officer of the New Jersey State Police got in touch with petitioner and his son, Daniel Dunn, and advised them that the third Cadillac and the Buick had been stolen. The officer stated that if the Dunns wanted to stay out of jail, they would have to get the cars back.(Tr. 77-79,82-83,201-209)

It was agreed with the officers of the New Jersey State Police that the Dunns would engineer a "set up" for Duke Bryant, who had sold the three Cadillacs to Daniel Dunn, by arranging to have him sell an automobile in New Jersey. After Duke Bryant broke several appointments that had been scheduled with him by petitioner at which state police had been present to make an arrest, he finally delivered a 1967 Cadillac to petitioner's house, and shortly thereafter Duke Bryant was arrested by the officers.(Tr. 208-217)

Following the arrest of Duke Bryant, petitioner began to get threatening telephone calls. A man who identified himself as Duke Bryant's brother, told petitioner over the telephone, "You set him up and we're going to get you. Your life ain't worth a nickel." In later telephone calls, he threatened to "get" petitioner's family.(Tr. 217-220) Petitioner told his contact with the New Jersey State Police about these threats, but the response was that he would receive some consideration when the two cars were recovered.(Tr. 281)

Petitioner testified that in a

telephone conversation with Duke Bryant's brother, petitioner suggested that Duke Bryant would be released if they could obtain some information that would implicate the higher ups in the automobile theft racket. Petitioner testified that he subsequently received a telephone message from an unknown caller who used a code word the Bryants had supplied, and this message gave him the information he believed he needed to help the New Jersey State Police solve the automobile thefts. In response to the message petitioner picked up an automobile in a place along the side of a road in New Jersey during the middle of the night, drove this automobile to North Carolina, and arrived at the establishment of the used car dealer, who, later as one of the Government's witnesses identified petitioner and the automobile.(Tr. 217-223)

One of the Government's witnesses, a member of the New Jersey State Police, said that his investigation disclosed Duke Bryant was involved in a professional auto theft ring, admitted that he and the other officers had urged petitioner to help them recover the stolen cars, and acknowledged that it would not have surprised him to learn that Bryant's associates were "looking for" petitioner and that they might have "set up" petitioner in the same manner Bryant had been "set up."(Tr. 317-323)

It was petitioner's testimony that twice on the way to North Carolina he stopped to have the car looked over to

make sure that it was "legitimate," once at a Buick or Pontiac garage in Roanoke, Virginia, and once at the residence of a former police officer where petitioner inspected the automobile personally. (Tr. 230,240-241) The former police officer corroborated petitioner's testimony to the extent that he said he found petitioner inspecting the automobile in the witness' garage.(Tr. 174-176)

The trial judge, in his remarks before finding petitioner guilty, said, "...there are many things to me that indicate that Mr. Dunn knew or he certainly should have known that this car was a stolen car.(Tr. 347)

The basis for federal jurisdiction in this case is 18 U.S.C.A. 3231, which gives United States District Courts jurisdiction to try federal criminal cases.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the United States Court of Appeals for the Fourth Circuit has decided important questions of federal constitutional law and federal criminal law, which have not been ruled upon specifically by this Court; and the decision below decided a question of federal constitutional law in a way which is in conflict with closely analogous decisions of this Court.

1. The only evidence establishing

the serial number of the automobile which petitioner was driving, was the vehicle identification number serial plate removed by the FBI agent from the left door post of the car. Defendant, upon request of the agent, initially said he would allow the car to be examined. This examination took place in a garage in High Point, and at the end of it the FBI agent told petitioner he was free to leave. The agent explained to the court that at the time the examination was completed, there was no information that the car was stolen, so there was no reason to hold petitioner. The evidence indicates that even during the examination of the automobile at the garage, petitioner's presence was custodial, and not consensual, since he was forced back into his chair by an officer when he attempted to get a drink of water.

Immediately after leaving the garage, petitioner was apprehended on a charge, which between the lines of the record, appears to have been trumped up for the purpose of holding him for further examination. When petitioner was placed in jail on this charge of reckless driving, he parted company with the automobile, and he never again was given the opportunity to permit or deny a search of the vehicle. It was necessarily sometime after petitioner was put in jail that the FBI agent gained access to the automobile and removed the piece of evidence.

The search of petitioner's

automobile and the seizure from it of a vehicle identification number serial plate, were in violation of the Fourth Amendment. First, there was no indication that a search warrant had been obtained. Second, a warrantless search was not justifiable as an incident to a lawful arrest, because the search was not made until after petitioner had been taken into custody on the unrelated charge of reckless driving. Preston v. United States, 376 U.S. 364 (1964). Third, there was no basis for a warrantless search on the ground that the mobility of the automobile would make it too burdensome to get a search warrant, because there was no probable cause to believe the car was stolen, since petitioner had been released by the FBI agent for the reason that there was no evidence on which to hold him, and because further once petitioner was taken into police custody his automobile lost its mobility and failure to procure a warrant could no longer be excused. Dyke v. Taylor Implement Manufacruring Co., Inc., 391 U.S. 216 (1968). Fourth, no constitutionally sufficient consent to the search had been given by petitioner, since even if the initial assent by petitioner to examination of the car extended to seizure of an item of evidence from it after his arrest, the evidence was obtained in a manner which violated the condition attached to the consent by petitioner, that he be present while the examination was being made.

Petitioner's court-appointed counsel did not object to the introduction of the vehicle identification number serial plate. In Henry v. Mississippi, 379 U.S. 443 (1965), it was established that a defendant will not be precluded from asserting constitutional claims merely because of failure of counsel to observe the contemporaneous-objection rule, unless his counsel deliberately bypassed the making of an objection as a part of the trial strategy in the case. There, as here, evidence produced from the search of an automobile was involved, and there, as here, petitioner's counsel had failed to interpose an objection to the introduction of the evidence. The record in the present case is barren of any showing that petitioner's counsel deliberately failed to object to the admission of this exhibit for purposes of trial strategy. This exhibit is the one strand of evidence that tied the Government's case together on the issue of whether or not the automobile was stolen; without this evidence defendant's motion for dismissal would have to have been allowed. The record can only suggest inadvertence, neglect, or ignorance as explanations for failing to make efforts to exclude this evidence.

Subsequent to Henry v. Mississippi, this Court has made it clear that a criminal defendant must either personally waive his constitutional rights or acquiesce in his attorney's attempted waiver of them. In Brookhart v. Janis, 384 U.S. 1 (1966), it was held that the accused in a criminal action could not

be deemed to have waived his rights of confrontation and cross-examination, by agreeing that the prosecution need only make a prima facie showing of guilt with the accused neither offering witnesses on his behalf or cross-examining any of the prosecution's witnesses. The Court thus held that there must be a waiver in the constitutional sense, "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458,464 (1938), and that this waiver must be made by the defendant personally and not by counsel acting in his behalf without consulting with the defendant and obtaining the defendant's informed consent, before a fundamental constitutional right can be regarded as having been lost for failure to make a timely technical gesture. In the present case there is no indication that petitioner personally understood that he might be losing his right to challenge this evidence, and certainly there is no indication that petitioner purposely gave up his right to complain of the unconstitutional search and seizure.

2. Before announcing the verdict, the trial judge said that petitioner knew or should have known that the automobile was stolen. By using the expression "should have known" the judge was invoking the objective standard, the standard of a man of ordinary or reasonable intelligence and prudence. The use of this standard is improper in a criminal prosecution, where only the actual state of mind of

the defendant is pertinent.

Among the many cases of the lower courts holding that the objective standard may not be used to establish defendant's knowledge that property was stolen, in a prosecution for receiving stolen goods (and similar offenses), are United States v. Werner, 160 F.2d 438 (1st Cir. 1947); Kasle v. United States, 233 F. 878 (6th Cir. 1916); State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935); Commonwealth v. Boris, 317 Mass. 309, 58 N.E.2d 8 (1944); Von Sprecken v. State, 70 Ga. App. 222, 28 S.E.2d 341 (1943); State v. Hamilton, 166 S.C. 274, 164 S.E. 639 (1932).

In Kasle v. United States, supra, the test is explained as follows:

> Plainly such tests as these of guilty knowledge on the part of the accused subjected him to a standard of conduct and of capacity to detect crime, which the jury might conclude to be the standard of reasonable and honest men of average intelligence, when acting under circumstances like those which might be found to have existed here. The effect of such test was to charge the accused with guilty knowledge or not upon what the jury might find would have induced belief in the mind of a man such as they were told to consider, rather than the belief that was actually created

> in the mind of the accused; or, at last, the accused might be condemned even if his only fault consisted in being less cautious or suspicious than honest men of average intelligence are of the acts of others. The result of the rule of the charge would be to convict a man, not because guilty, but because stupid. The issue was whether the accused had knowledge--not whether some other person would have obtained knowledge--that the goods had been stolen. The circumstances must have had that effect upon the mind of the accused, to constitute knowledge in him. The issue must be determined upon the individual test of the accused. It may well be that the tests stated in the charge are proper enough to fix civil liability for the acts or omissions of a defendant, but hardly to fasten upon him an intent to commit a felony.--233 F.878, 887.

In the usual case a substitution of the objective standard for the subjective standard might not be as prejudicial to the accused as it was in the present case. Here, however, from petitioner's testimony it appears that all of the events leading up to his arrest, are viewed by him in the perspective of a secret police mission, for the purpose of assisting the New Jersey

State Police recover the stolen automobiles his son had sold and apprehend the leaders of the car theft ring. The New Jersey State policeman who testified at the trial, lent some credence to petitioner's story, by readily admitting that petitioner had helped them capture Duke Bryant, who was believed to be a member of a professional auto theft ring, and he acknowledged that the police had urged petitioner to help them recover the stolen automobile. The record demonstrates that petitioner is not inclined toward conventional thought and behavior.

When viewed in the light of petitioner's stated belief that he was performing a secret police mission when he drove the automobile from New Jersey to North Carolina, the evidence which would ordinarily be sufficient to establish guilty knowledge, loses much of its force. For instance, the use by petitioner of the name Robert Dixon which was the name on the license and registration that came with the car, is quite logical in this context.

Petitioner's efforts to gain assurance that the automobile was not stolen, by having it examined in a garage at one point and by personally examining it at another point, are contradictory of guilty knowledge. Also the inordinate risks taken by petitioner in the journey that ultimately led to his conviction, are strikingly at variance with the conduct of the ordinary criminal; petitioner did not take even

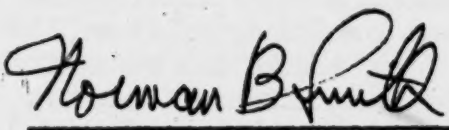
the most elementary precautions against detection, for he carried his own identification papers and the identification of Robert Dixon, he presented a New York title to an automobile that had New Jersey license plates, and he remained at the used car lot in High Point long after the owner began acting suspiciously and while ample time to flee remained.

This is a case in which the petitioner was seriously prejudiced by the use of the wrong standard of determining guilty knowledge by the trier of fact. Perhaps a person of ordinary and reasonable prudence could be found to have the guilty knowledge requisite for conviction on the basis of the Government's case. But here the un-refuted, and partially supported, evidence offered in behalf of petitioner, as well as the conduct of petitioner in the courtroom as is amply demonstrated by a casual reading of the record, shows that petitioner was not a man of ordinary intelligence and prudence. Under the well established rule, petitioner should have been chargeable only with what he knew, not what he should have known, about the automobile.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this

petition for a writ of certiorari should be granted.



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APPENDIX TO PETITION

CORRECTED COPY

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13,702

United States of America,

Appellee,

versus

John Patrick Dunn,

Appellant.

Appeal from the United States District Court, Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued November 5, 1969 Decided November 14, 1969)

Before WINTER and CRAVEN, Circuit Judges, and WIDENER, District Judge.

Norman B. Smith for Appellant, and William L. Osteen, United States Attorney, (Richard M. Dailey, Jr., Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

We think the evidence abundantly establishes that the vehicle was stolen and that this Dyer Act defendant knew it was stolen when he transported it in interstate commerce. The district judge's comment that defendant "knew or should have known" that the automobile was stolen was, we think, merely an inexact way of expressing his appraisal of the evidence as establishing guilt beyond a reasonable doubt. Had it occurred in a trial to a jury we would be concerned, for the proper test is, of course, not whether Dunn should have known the vehicle was stolen, but whether he knew it was. The out of context inaccuracy of the phrase, however, is overcome by the district judge's other statements showing that he did not try the case under misapprehension of law.

We have considered exceptions to the admission of evidence. If error occurred we think it harmless. In the reception of seized evidence we find no deprivation of Fourth Amendment rights.

Accordingly the conviction is affirmed.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 949

JOHN PATRICK DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1969. The petition for a writ of certiorari was filed on December 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether evidence as to the alteration of a vehicle identification plate, to which no objection was made at trial, was properly received.

2. Whether, in a non-jury trial, the trial judge applied an improper standard because he said in reviewing the evidence that petitioner knew or "should have known" that the vehicle which he transported in interstate commerce had been stolen.

STATEMENT

After a non-jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of a violation of the Dyer Act (18 U.S.C. 2312). On April 14, 1969, he was sentenced to four years' imprisonment.

The evidence showed that between May 19 and May 25, 1968, a 1966 Buick sedan was stolen from a street in Brooklyn, New York. The last four digits of the identification number of this vehicle were 8561 (1 R. 7-9).[1] On August 26, 1968, petitioner, a resident of New Jersey, attempted to sell a similar vehicle, but with the last four digits of its number reading 8564, to a used car dealer in High Point, North Carolina (1 R. 20, 25, 37, 62). Petitioner at that time claimed to be named Dixon. The vehicle had been registered in New York to a man named Dixon, but had New Jersey license plates (1 R. 18-20).

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[1] "R." preceded by the volume number refers to the two-volume trial transcript, which we are lodging with the Clerk of this Court.

Upon noticing this discrepancy, the High Point used car dealer called the area F.B.I. agent, one Fairchild (1 R. 22).

After full warnings (1 R. 31-33, 53, 58-59), petitioner told agent Fairchild that he had bought the car two years earlier in New York. He showed the New York registration made out in the name of Dixon, as well as the New Jersey driver's license in the same name (1 R. 34-35). Petitioner gave the agent permission to search the car, telling him he could "take the car apart" and that it was not a stolen car (1 R. 36; 2 R. 255).

While he waited for the agent to examine the vehicle, petitioner took some medicine and appeared nervous (1 R. 58; 2 R. 257). Shortly after the search was concluded, petitioner left the local garage, where the inspection had occurred, in the Buick. He was later stopped for reckless driving by the local police. At that time he showed his own driver's license in the name of Dunn, but a vehicle registration in the name of Dixon. He was then arrested and held overnight in the local jail (1 R. 43; 2 R. 260-262).[2]

Some time after the examination of the vehicle at the garage (1 R. 55), agent Fairchild removed the identification plate containing the vehicle's serial number and forwarded it for expert examination

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[2] There is no evidence of any collusion between agent Fairchild and the local police (1 R. 49-50, 56; 2 R. 260). Prior to the local arrest, petitioner and agent Fairchild had agreed to meet the following morning for further investigation of the circumstances surrounding his possession of the vehicle (1 R. 42, 48, 55-56).

(1 R. 37, 39). This examination revealed that the last digit of the number had been changed from a "1" to a "4" (1 R. 63). There was no objection to the admission of this serial plate (Government Exhibit 5), nor to the expert evidence concerning its alteration (1 R. 37, 40, 62-64).

At trial, petitioner testified that he had no idea that the Buick automobile was a stolen vehicle. He stated that he had never seen the Buick before it had been entrusted to him by some unknown and unseen individual who had given him instructions to drive it to High Point, North Carolina, where car auctions were held (1 R. 222, 2 R. 281, 289, 298).[3]

The trial court in finding petitioner guilty stated that he attached little credence to petitioner's version of events (2 R. 347-348). In the course of his remarks the court said that he thought petitioner

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[3] Petitioner and one of his sons contended that petitioner's trip to High Point was the result of threats made against petitioner because of his cooperation with the New Jersey police which resulted in the arrest of one Bryant for car theft (1 R. 124, 127, 133, 137, 222; 2 R. 281-283). However, no connection between Bryant and the interstate transportation of the stolen Buick was otherwise shown. Indeed, the New Jersey license plates on the Buick, at the time that petitioner attempted to sell it, were plates that had been issued to petitioner's son for another Buick, one which had been "burned" on May 28, 1968 (1 R. 173; 2 R. 290). Petitioner quotes part of police officer Smith's testimony that he, a New Jersey police officer (2 R. 317), would not have been surprised if Bryant's associates might have threatened petitioner (Pet. 10). He omits, however, Smith's next assertion that he did not think such threats "might be likely" (2 R. 323). Bryant, in petitioner's presence, admitted to officer Smith that he sold the Buick vehicle to petitioner, but claimed it was not a stolen car (2 R. 318-319).

was a pawn in the hands of others but that "there are many things to me that indicate that Mr. Dunn knew or he certainly should have known that this car was a stolen car" (2 R. 347). The court then mentioned various factors which led to his conclusion, and said (2 R. 348): "I do think and I feel that this evidence shows beyond any doubt that this charge is true."

ARGUMENT

1. As petitioner acknowledges, the issue of the legality of the removal of the vehicle identification plate from the Buick, after petitioner had been arrested by the local authorities, was not raised at trial (Pet. 7, 14). Absent plain error, he should not be permitted to raise this issue and thereby shift his theory of defense on appeal. Rule 30, F. R. Crim. P., requires timely objection as a prerequisite for a later claim of error. See, *e.g.*, *Singer* v. *United States*, 380 U.S. 24, 38. Normally, the failure to object at trial constitutes waiver and precludes appellate consideration of such a matter. *E.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362; *United States* v. *Indiviglio*, 352 F. 2d 276, 279 (C.A. 2), certiorari denied, 383 U.S. 907; *Bond* v. *United States*, 397 F. 2d 162 (C.A. 10), certiorari denied, 393 U.S. 1035.

In the instant case, moreover, the failure to raise the Fourth Amendment issue was deliberate. Petitioner and one of his sons attempted at trial to convince the court of petitioner's honest ignorance of the stolen character of the Buick which petitioner transported to North Carolina. Both testified that they

were cooperating with the police in an effort to recover stolen cars that they had unwittingly bought from Bryant and thereafter sold (1 R. 69-74, 78-81, 187-210). As the defense counsel stated, "our whole defense is based upon a chain of circumstances which placed [petitioner] in the situation which he felt it necessary to come to North Carolina" (1 R. 74). Thus, the defense theory at trial was that the alteration of the identification plate was a surprise to the petitioner, in accord with his August 26 assertions to agent Fairchild that the vehicle was not stolen (2 R. 255). Petitioner is a college graduate (1 R. 33) and his counsel was deemed by the trial court to be a very competent attorney (1 R. 203; 2 R. 238). When counsel and an accused adopt consistent strategy, their strategy is binding even though "their plans backfired." *Henry* v. *Mississippi*, 379 U.S. 443, 451; *Pope* v. *Swenson*, 395 F. 2d 321, 325 (C.A. 8). Accordingly, the present attack on the defense counsel at trial (Pet. 14) and the effort to raise a new issue are both unwarranted. It is therefore unnecessary to consider whether petitioner's initial invitation to agent Fairchild to "take the car apart" authorized removal of the identification plate for ease in testing, or whether the court below correctly concluded that "[i]n the reception of seized evidence [there was] no deprivation of Fourth Amendment rights" (Pet. App. 22).

2. When the trial judge's remarks are read as a whole it is evident that the court was not using an improper standard in determining the existence of guilty knowledge on petitioner's part, despite its

statement that petitioner "knew or * * * should have known" that the car transported was stolen. In proving scienter, circumstantial evidence must ordinarily be relied upon and a court may conclude that the government met its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to perceive. *United States* v. *Benjamin*, 328 F. 2d 854, 862 (C.A. 2), certiorari denied, 377 U.S. 953; cf. *Spurr* v. *United States*, 174 U.S. 728, 735. Moreover, the court went on to say that the evidence showed "beyond any doubt" that the charge was true (2 R. 348), and the evidence amply supported this finding, as the court below properly determined (Pet. App. 22).[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1970.

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[4] As the court of appeals succinctly stated, "The out of context inaccuracy of the phrase * * * is overcome by the district judge's other statements showing that he did not try the case under misapprehension of [the applicable] law" (Pet. App. 22).

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